07-2430-CV(L)

07-2548(XAP) & 07-2550(XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ONEIDA INDIAN NATION OF NEW YORK, ONEIDA TRIBE OF INDIANS OF WISCONSIN, ONEIDA OF THE THAMES,
Plaintiffs-Appellees-Cross-Appellants,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee-Cross-Appellant,

NEW YORK BROTHERTOWN INDIAN NATION,
Plaintiff-Intervenor

v.

COUNTY OF ONEIDA, COUNTY OF MADISON,
Defendants-Cross-Appellees,

STATE OF NEW YORK,
Defendant-Appellant-Cross-Appellee.

On Appeal from an Order of the United States District Court
For the Northern District of New York

BRIEF OF APPELLEES-CROSS-APPELLANTS ONEIDA INDIAN NATION OF NEW YORK, ONEIDA TRIBE OF INDIANS OF WISCONSIN, AND ONEIDA OF THE THAMES

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ABBREVIATIONS

A – Joint Appendix

DE – Docket Entry (the full docket report below appears at A1-78)

E – Exhibits to the Joint Appendix

SB – Brief of the State of New York

SPA – Special Appendix

The Oneida cases listed in the Table of Authorities are cited by reporter and page number because of their similar titles, with the exception of the Supreme Court's three decisions identified as *Oneida I, Oneida II* and *Sherrill.*

INTRODUCTION

These interlocutory appeals arise from a May 21, 2007 order of the United States District Court for the Northern District of New York (Kahn, J.), granting in part and denying in part the defendants' motion for summary judgment. (SPA 2-33). Both the State's appeal and the cross-appeals filed by the United States and the Oneida plaintiffs concern the scope of the Court's decision in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), and, more specifically, whether that decision requires the dismissal of Indian land claims without regard to whether the claim is based on a continuing right of possession and without regard to whether the elements of laches – unreasonable delay and resulting prejudice – are shown.

The District Court dismissed as too disruptive the Oneidas' claim for trespass damages premised on a continuing right to possess land acquired by New York State in violation of federal law, relying on *Cayuga* and *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). The Court concluded, however, that those decisions did not foreclose all relief for the Oneidas' "long-suffered wrongs." (SPA4). The District Court allowed the Oneidas to proceed with their non-possessory claims for fair compensation from the State for the land it had illegally acquired at far less than its true value.

JURISDICTIONAL STATEMENT

The District Court certified its order for interlocutory review pursuant to 28 U.S.C. § 1292(b). (SPA33). The State filed a timely petition for review of the District Court's certified order on June 5, 2007. The Oneidas and the United States timely filed cross-petitions pursuant to FRAP Rule 5(b)(2) on June 13, 2007. This Court granted the State's petition to appeal (No. 07-2430-cv) and the Oneidas' and the United States' cross-petitions (Nos. 07-2550-cv and 07-2548-cv, respectively) on July 13, 2007. Accordingly, this Court has jurisdiction to review the certified order pursuant to 28 U.S.C. § 1292(b). *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996); *CalPERS v. WorldCom, Inc.*, 368 F.3d 86, 95 (2d Cir. 2004).

ISSUES PRESENTED

1. Whether *Cayuga* requires dismissal of the Oneidas' claim for fair compensation from the State of New York for land that it acquired from the Oneidas in violation of federal law when the fair compensation remedy, based on the State's underpayment at the time of acquisition, presumes the validity of, and does not call into question, the titles or possessory rights of today's landowners?

2. Whether *Cayuga* requires the dismissal of a tribal land claim on the basis of laches in the absence of unreasonable delay and resulting prejudice?

3. Whether, if it is deemed to bar any and all monetary relief on a tribal land claim even in the absence of unreasonable delay and prejudice, *Cayuga* was wrongly decided because it conflicts with the Supreme Court's decision in *Oneida II*, which the Supreme Court took care in *Sherrill* to say was not overruled with respect to the availability of a money damages remedy?

STATEMENT OF THE CASE

A. Federal Protection of Indian Land

At the behest of President Washington and Secretary of War Henry Knox, the First Congress enacted the Indian Trade and Intercourse Act (ITIA) in 1790.[1] 719 F.2d 525, 528 (2d Cir. 1983); *Oneida II*, 470 U.S. 226, 231 (1986). Washington and Knox wanted to avoid being drawn into war over disputed land transactions. *See* F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts* 41-50 (1970); I Richardson, *Messages and Papers of the Presidents* 95 (1897) (purpose was to "obviate imposition" on tribes, a "main source of discontent and war"). The Six Nations of the Iroquois

[1] 1 Stat. 137, § 4 (July 22, 1790) (SPA60). The Act was no secret to the New York officials involved in buying Oneida land. The Secretary of State transmitted various versions of the ITIA to New York, (E1559; E1676-78; E1713), and New York Senator Phillip Schuyler, later the lead negotiator for the State in its 1795 Oneida land purchase, was appointed to the Senate select committee that considered the bill and was one of the Senate managers on the conference committee. Senate J., 174, 176, 179 (1790). (E1542). Egbert Benson also represented New York in the First Congress and in 1795 wrote to Governor Jay about the requirements of the 1793 version of the ITIA. (E1578-79).

Confederacy (which included the Oneidas) were particularly important to this calculus, because they controlled or carried great influence through the Ohio Valley and the Great Lakes, where the British maintained a military presence.[2]

President Washington assured the Six Nations that a provision of the ITIA, now generally known as the Nonintercourse Act, would protect them from being cheated in future land transactions:

> Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

464 F.2d 916, 918-19 (1972) (citation omitted). (*See also* E1546-52 (Timothy Pickering speech at Newtown Point); E1547 ("in [the] future you cannot be defrauded of your lands")). The Nonintercourse Act forbade purchases of Indian land without the approval of the United States through a treaty negotiated by a federal commissioner and proclaimed by the President with the advice and consent of the Senate. *Oneida I*, 414 U.S. 661, 667-68 & n.4 (1974). (*See* E1671 (letter from Secretary of War Pickering to Governor Jay explaining statutory procedure)).

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[2] As the Supreme Court noted in *Oneida II*, "[a]lthough most of the Iroquois sided with the British, the Oneidas actively supported the colonists in the [American] Revolution. This assistance prevented the Iroquois from asserting a united effort against the colonists, and thus the Oneidas' support was of considerable aid. After the War, the United States recognized the importance of the Oneidas' role, and . . . the National Government promised that the Oneidas would be 'secure in the possession of the lands on which they are settled.'" 470 U.S. at 231.

In 1793, Congress enacted a tougher version of the Nonintercourse Act.[3] 719 F.2d at 528.

In 1794, Secretary of War Timothy Pickering met with the representatives of the Six Nations and negotiated a federal treaty that explicitly recognized the lands then held by the Oneida, Onondaga and Cayuga tribes as their reservations and their property.[4] Treaty with the Six Nations, Article II, 7 Stat. 44, (Nov. 11, 1794) ("Treaty of Canandaigua") (SPA41-44). Article III of the treaty granted the same recognition to Seneca land. (SPA42). In exchange, in Article IV the tribes agreed to surrender claims to other land in the Ohio Valley. (SPA42). During the treaty discussions, Pickering assured the Oneidas that "the United States will protect you" in land transactions. (E721). The United States continues to make annuity payments under the Treaty of Canandaigua to the Oneidas to this day. (Article VI, SPA43).

The Oneida reservation at the time of the Treaty of Canandaigua included some 300,000 acres in Central New York. 719 F.2d at 528.

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[3] 1 Stat. 329 (Mar. 1, 1793). Congress reenacted the statute "without major change" in 1796, 1799, 1802 and 1834. *Oneida I*, 414 U.S. at 668 n.4. The Nonintercourse Act is codified at 25 U.S.C. § 177. The various versions of the Act are reproduced at SPA58-103.

[4] The Oneidas reserved the land in a 1788 treaty ceding millions of acres of aboriginal territory to the State of New York. *Sherrill*, 544 U.S. at 203 (quoting *Oneida II*, 470 U.S. at 231); *see also* 337 F.3d 139, 156, n.13 (2d Cir. 2003) (rejecting argument that the Oneidas also ceded the reserved land).

B. New York's Policy of Acquiring Indian Land Without Federal Approval and at Less Than Its True Value

New York adopted a prohibition against private purchases or leases of Indian land as part of its state constitution after declaring independence. *See Jackson ex dem. Gilbert v. Wood*, 7 Johns. 290 (N.Y. Sup. Ct. 1810) (invalidating conveyance by heirs of Oneida veteran). As the monopoly buyer and seller, the State was able to make large profits on the resale of land it acquired from Indian tribes, financing a large share of state expenses through such revenues. (E711-15). The State made unsuccessful efforts to buy Oneida land in 1793 and 1794. (E716). In 1795, after the Oneidas petitioned for additional authority to lease land, (E1746-48), the state legislature enacted a statute appointing state agents to buy Oneida land. The legislature rebuffed an amendment to ask for the appointment of a federal commissioner to hold the treaty. (E724; E1576).[5]

The legislature also overrode a veto by the State's Council of Revision, which had ruled that the terms of the purchase were inconsistent with the State's pledge a year earlier to sell land for the exclusive benefit of the Indians. (*See* E1300). The Council of Revision pointed out that, under the terms of the 1795

[5] The legislature had prior notice of the need for a federal treaty. Earlier in 1795, a member of the State Assembly had read a letter from Secretary of War Pickering explaining why the issuance of a land patent for Oneida land would violate federal law as it had not been approved by a federal treaty. (E1569-70; E1573). An amendment to 1794 legislation to require a federal commissioner for a purchase of Oneida land had been passed but then rejected by the State Assembly. (E1561; 1563).

statute, at least three quarters of the benefit of the purchase would go to the State's coffers, not to the tribe, as the State had promised. (E725; E1307-08). Nevertheless, the legislature sent the commissioners forth with statutory instructions to pay the Oneidas no more than one-fourth the minimum resale price of the land. (E1302; 1303; E1310). Yet the commissioners misled the Oneidas: "The terms we have offered are just and generous, and the price as much as the lands may be worth under all the circumstances." (E1312-13).

C. Oneida Land Transactions

Secretary of War Timothy Pickering learned of the 1795 New York law authorizing purchases from the Oneidas. Pickering consulted with Attorney General William Bradford, who issued an opinion explaining why the State's plan to purchase land without a federal commissioner violated the Nonintercourse Act. (E1581-83). Pickering sent Bradford's opinion to outgoing New York governor George Clinton and incoming governor John Jay. 719 F.2d at 529. Jay responded in a careful letter emphasizing his duty under state law to adhere to the will of the state legislature and declining to recall the treaty party that had already gone forth. (E1604-05). He agreed, however, to request the appointment of a federal commissioner to conduct a land purchase treaty with the Mohawks, (E1614-18), and did so for other tribes as well later in his administration, including for an Oneida treaty in 1798. (E1682-83; E1685; E1695).

At first, the state commissioners failed to persuade the Oneidas to sell any land. (E731). In response to objections from the federal Indian agent, the State's lead negotiator argued that President Washington's transmission of Cayuga and Onondaga requests to sell their land without mentioning the need for a federal commissioner implicitly gave the State permission to buy (from the Oneidas) without complying with the Nonintercourse Act. (E729; E1649; E1661). The Oneidas would not sell, and the state commissioners left. Then, with winter and hunger closing in, the Oneidas relented. They agreed to send a delegation to Albany, where an agreement was reached to sell over 100,000 acres of the Oneida reservation for the price set by the State. The State then auctioned the land for an average of $3.53 per acre, or more than seven times what it paid. (E734-35).

With the exception of the 1798 federal treaty and an 1802 treaty overseen by a federal commissioner but never proclaimed, the 1795 treaty established a pattern that continued until almost all of the reservation had left Oneida hands. The State repeatedly purchased land without a federal commissioner and without congressional approval and for far less than the land was worth. Through 1827, the cumulative shortfall between what the State paid for Oneida land and what it sold the land for was $512,000, as shown in the detailed chart in the Appendix. (A612-18; E669). In 1829, the State promised to pay the full value based on an appraisal, but the appraisal values consistently fell short of the actual sales prices.

(E1479-84; 1486-90; E1492; E1494-96; E1500; E1503).[6] As an 1855 state report put it, "[t]heir lands were obtained for little or naught, and are now worth millions." (E1857; *see also* E1833).

Land sales created a "vicious circle," 434 F. Supp. 527, 536 (N.D.N.Y. 1977), because as the Oneidas' reservation shrank, hunting and fishing ceased to be viable and the tribe became dependent on further sales for sustenance. (E760-61). Individual Oneidas were bribed, tricked or liquored into authorizing sales of timber, and settlers encroached on Oneida farms. (E766-78; E1800-01; E1907-08). The Oneidas petitioned the Governor to prevent further solicitations to sell land, but to no avail. (E1792-94; E1796-97; E1907-08; E1910; E1921).

The 1838 Treaty of Buffalo Creek (7 Stat. 549), set aside land in Kansas for New York tribes in a trade for land the tribes held in Wisconsin. The Oneidas insisted on and obtained an assurance from the federal commissioner who had negotiated the treaty that they would not have to move. Commissioner Ransom H. Gillet "most solemnly assured them that the treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York. . . . The treaty gives them lands if they go to them and settle there but they need not go

[6] In 1843, also without any federal approval, the State authorized Oneidas to own land individually (in severalty) rather than tribally. The State also unilaterally granted patents to Oneida land. (A219).

unless they wish to." 337 F.3d at 161.[7] Few Indians, and almost no Oneidas, moved to Kansas. (E1831). In 1860, the United States returned the Kansas land to the public domain. *Sherrill*, 544 U.S. at 207.[8]

[7] The State devotes several pages of its statement of the case to the Treaty of Buffalo Creek and Indian removal policy. (SBR6-10). The legal effect of the Treaty of Buffalo Creek on the Oneidas' land in New York is not before the Court on this interlocutory appeal. The District Court previously reserved judgment about the Treaty of Buffalo Creek in connection with the Oneidas' motions to dismiss counterclaims and to strike defenses. 194 F. Supp. 2d 104, 140-42 (N.D.N.Y. 2002). The defendants did not seek summary judgment on the basis of that treaty following the completion of discovery on liability, limiting the motion (now before this Court) to other grounds.

The United States and the Oneida Indian Nation of New York addressed the meaning of the treaty in briefing in *City of Sherrill v. Oneida Indian Nation. See* 2004 WL 2246334 (U.S. amicus brief); 2004 WL 2246333 (Resp. brief). The Treaty of Buffalo Creek cedes Oneida land in Wisconsin, not in New York, and says nothing about earlier state purchases, so it cannot be construed as restrospectively approving them. After the District Court's 2002 ruling on the motion to dismiss counterclaims, this Court concluded that the Treaty of Buffalo Creek did not approve the earlier land transactions in *City of Sherrill v. Oneida Indian Nation*, 337 F.3d at 161-65, and the Supreme Court declined to review that holding. 544 U.S. at 215 n.9. In the test case, the Counties argued that the 1795 transaction had been federally approved by subsequent treaties in 1798, 1802, and 1838. The District Court rejected that argument, 434 F. Supp. at 539. On appeal, and in the Supreme Court, the Counties abandoned reliance on the Treaty of Buffalo Creek. *See* 719 F.2d at 539-540. The Supreme Court rejected the Counties' submission (joined by the State) that the 1798 and 1802 treaties implicitly approved the earlier transaction by explicitly referring to it. *Oneida II*, 470 U.S. at 247 (requiring "plain and unambiguous" treaty).

[8] The Oneidas and other New York tribes were later awarded damages for the United States' breach of its promise to exchange Kansas land for land they owned in Wisconsin. *New York Indians II*, 170 U.S. 1 (1898); *Sherrill*, 544 U.S. at 207.

From the 1840s to the early 20th century, the Oneidas remained within the reservation in two tribal communities known as "the Windfall" and "the Orchard" as well as on individual parcels. (E3799). Oneida chiefs and tribal members continued to petition and protest the loss of Oneida land. (SPA14-15 n.3 (District Court summarizing the Oneidas' diligent efforts to pursue their claims); E790-1132; E1771-1818; E1873-2726)).

D. The *Boylan* Litigation and the Oneidas' Federal Possessory Right

In 1907, a private party filed suit in state court to foreclose a mortgage she held on land occupied by the Oneidas at the Windfall and to partition the land. (E2426). The state court ordered the eviction of the Oneidas, and they were physically removed from their homes. (E2493). In 1915, the United States filed suit in federal court to restore the lands to Oneida possession. The District Court ruled that the land was tribal land and had been unlawfully alienated. *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919). This Court affirmed that judgment, and the Oneidas were restored to possession. *United States v. Boylan*, 265 F. 165 (2d Cir. 1920).

E. Tribal Attempts to Obtain Redress

This Court issued a decision in a test case brought on behalf of the St. Regis Mohawks that closed the door to tribal claims notwithstanding *Boylan* unless the United States filed the suit. *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550

(2d Cir. 1929); *see* 464 F.2d at 920 (referring to *Deere* as support for jurisdictional dismissal). Nor could the Oneidas sue in state court. The state courts ruled that tribes lacked the juridical capacity to sue. *Seneca Nation v. Appleby*, 196 N.Y. 318 (1909). Tribal claims could proceed in state court only if authorized by specific legislation, and then only under the terms and conditions set by the legislature. *Seneca Nation v. Christie*, 162 U.S. 283 (1896) (suit was authorized but time-barred). New York never gave the Oneidas the right to sue for their land. (*See* E788 (County memorandum filed in the test case arguing good faith possession because "no state court, federal court, or other state or federal governmental authority would recognize plaintiffs' claim" before 1974)).

After World War II, Congress established the Indian Claims Commission to redress tribal grievances against the United States. The Oneidas filed a claim seeking compensation from the United States for failing to protect the Oneidas from the State of New York's illegal and unfair land purchases. Because the federal government's narrow waiver of sovereign immunity, however, the Oneidas could not recover full compensation for the land through an ICC claim.[9]

[9] Ultimately, the Oneidas dismissed their ICC claim after the Supreme Court ruled in the Oneida "test case" that tribes could seek trespass damages in federal court for land alienated in violation of their possessory rights under federal law.

In 1967, the Oneidas also petitioned the New York Constitutional Convention for access to the state courts. (E2724-26). The convention declined. The Oneidas also petitioned federal officials.

F. The "Test Case"

In 1970, the Oneidas filed a test case in federal court seeking to establish the principle that the state's acquisitions of the Oneidas' land violated federal law. The Oneidas drew hope from the recent enactment of 28 U.S.C. § 1362. *See* 464 F.2d at 924-25 (Lumbard, J., dissenting) (relying on § 1362 as conferring broader jurisdiction over claims brought by Indian tribes than existed under prior law).

The District Court dismissed the Oneidas' complaint for lack of federal subject matter jurisdiction, relying on *Deere*. This Court affirmed the dismissal. A unanimous Supreme Court reversed. *Oneida I*, 414 U.S. 661 (1974). Justice White's opinion explained that, after the Constitution, Indian land transactions became the "exclusive province" of the federal government. *Id.* at 667. Consequently, tribal possessory rights, and tort claims for trespass based on those rights, arose under federal common law, not state law. *Id.* at 669-74. On remand, the District Court awarded trespass damages. 434 F. Supp. 527 (N.D.N.Y. 1977).

Although the test case involved only the small amount of land held by two counties, the implications of the Supreme Court's decision and the District Court's award were not lost on anyone. In 1974, the Oneidas had filed this action to cover

all of the reservation land acquired by New York in violation of federal law. (A80-86). On appeal in the test case, this Court rebuffed the Counties' argument that the "catastrophic ramifications" of the decision was a reason for denying relief. 719 F.2d at 539. This Court affirmed the judgment awarding trespass damages, remanding only to modify certain aspects of the damage calculations. *Id.* at 544. The petitions for certiorari filed by the Counties and the State warned the Court about the implications of the decision for other Oneida land as well as for other tribal land claims. "Recognizing the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many eastern land clams, [the Supreme Court] granted certiorari." *Oneida II*, 470 U.S. at 230.

In 1985, the Supreme Court affirmed the finding of liability, rejecting arguments that the passage of time and the concomitant changes in ownership doomed the claim:

> One would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statute of limitations or other legal basis for holding that the Oneidas' claims are barred or otherwise satisfied.

470 U.S. at 253. The Court held that the ordinary rule applying state limitations periods to federal common law claims did not apply to the Oneidas' suit because that would conflict with the determination by Congress, when it enacted and amended 28 U.S.C. § 2415, to allow tribes to pursue centuries-old land claims. *Id.*

at 240-44. Concerning laches, the Court ruled that the Counties had failed to preserve the issue for review. *Id.* at 244-45. In a long footnote, the Court explained why the application of laches would be "novel, indeed." *Id.* at 244 n.16. In a later footnote to a sentence affirming "the finding of liability under federal common law," the Court left open the separate question (raised by the United States, as amicus curiae) "whether equitable considerations should limit the relief available to the present day Oneida Indians." *Id.* at 253 n.27. A final judgment, resolving the damages calculation issues, was entered in 2002. 217 F. Supp. 2d 292 (N.D.N.Y. 2002).

G. United States Intervention in the Oneida Land Claim

The Oneidas spent more than a decade in efforts to resolve the Oneida land claim on the basis of the principles resolved in *Oneida I* and *Oneida II*, while the present litigation remained on hold. 199 F.R.D. 61, 73 (N.D.N.Y. 2000) (A138-203). The United States moved to intervene as a plaintiff on behalf of the Oneidas to enforce the Treaty of Canandaigua and the Nonintercourse Act in 1998 after settlement efforts had failed. (DE 48-49). The District Court granted intervention. (DE 56); *see* 199 F.R.D. at 68.

After failed mediation efforts, the District Court turned to motions to amend the complaints proffered by the Oneidas and the United States, but held in abeyance during the mediation. Both amended complaints sought to add a class of

landowners. Neither the Oneidas nor the United States actually sought to eject any landowner. The Oneidas' complaint did not seek ejectment or eviction, 199 F.R.D. at 69 (A148).[10] The United States' complaint included "possible ejectment" as relief, but once it was clear that the complaint had been misinterpreted, the United States withdrew that language prior to argument on the motion to amend. *Id.* The United States made it clear that its goal was to resolve the case through a damages payment by New York State alone. (*See* A250 ("As the original and primary

[10] Contrary to Judge McCurn's belief that ejectment was the desired goal, 199 F.R.D. at 68, the Oneidas desired only to avoid a claim that they had waived their possessory rights by failing to assert them or by failing to join necessary parties. As counsel for the Oneida Indian Nation of New York explained at oral argument in *City of Sherrill*:

> **JUSTICE O'CONNOR**: Well, if you prevail in this case, then could suits be brought by the tribe to evict current owners of land on this historical Oneida 300,000-acre reservation?
>
> **MR. SMITH**: No, Justice O'Connor. The Courts have ruled that we may not do that and it is the position and I will state it clearly here today that the Oneidas do not assert a right to evict landowners in the land claim area.
>
> **JUSTICE O'CONNOR**: But if it's owned by the State of New York, if it's been acquired somehow by the state, then what?
>
> **MR. SMITH**: We are not asserting a right to evict. We are not waiving any of the underlying rights that involve right to possession under federal law and aboriginal rights and the point I'm making should not be construed that way.
>
> What I'm saying is that we are not asking the Court and do not expect the Court to evict anyone from land that is not in our actual possession.

tortfeasor, New York State is liable for all damages to the Subject Lands caused by the State wrongfully and unlawfully acquiring and/or transferring the Subject Lands from the Oneida Indian Nation, irrespective of later transfers of portions of the subject lands.")).

The District Court (McCurn, J.), denied the motions to amend with respect to remedies against private landowners. The District Court ruled there was "a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right." 199 F.R.D. at 90 (A191). The Court ruled that the Oneidas and the United States had an adequate remedy in the form of a claim for damages against the State, *id.* at 93-94 (A199-200), and that ejectment of private landowners was barred by the "impossibility" doctrine, *id.* at 93 (A198). The Oneidas and the United States subsequently filed amended complaints seeking relief only against the State and Madison and Oneida Counties. (A205-234; A236-252).

The Oneidas' prayer for relief (A230) included the following:

> (6) because New York State received benefits from its purported purchases and sales of the subject lands – including but not limited to the difference in value between the price at which New York State acquired or transferred each portion of the subject lands from the Oneida Indian Nation and its value – and to the extent that that defendants received benefits as a result of their illegal possession of portions of the subject lands, disgorgement of the value of those benefits, with interest;
>
> * * *

> (8) all relief available, at law or equity, to enforce the rights of the plaintiffs as alleged in this complaint, and such other and further relief, both special and general, at law or in equity, as the Court may deem just and proper.

The complaint alleged that "the State made substantial profits on its purported sales of the subject lands." (¶ 35, A220; *see also* ¶ 3, A207 (Oneidas seek "disgorgement of the amounts by which defendants have been unjustly enriched by reason of the illegal taking of the subject lands")). The United States' amended complaint sought "damages, including prejudgment interest, against the State of New York as primary tortfeasor, for causing the violation of Plaintiff Tribes' enjoyment of their rights under federal law," as well as for "the trespasses to the Subject Lands that originated with the State's illegal transactions." (Prayer for Relief, ¶ 1, A251; *see also id.* ¶ 3 (seeking "other and further relief")).

H. The *Sherrill* Litigation

After *Oneida II*, the Oneida Indian Nation of New York acquired land within the Oneida reservation acknowledged in the Treaty of Canandaigua. The Nation contended that, because Indian title had never been extinguished under federal law, the land, once restored to tribal possession, was not subject to state property taxation, just as it had not been subject to state taxation before it illegally left Oneida possession. Ruling in a case brought by the Nation against the City of Sherrill, the District Court (Hurd, J.), agreed that the land was Indian country that was not subject to property taxation, enjoining the City of Sherrill from collecting

property taxes on Nation-owned land. 145 F. Supp. 2d 226 (N.D.N.Y. 2001). This Court affirmed the judgment as to Sherrill, rejecting arguments about the validity of the land transactions and about disestablishment of the Oneida reservation. 337 F.3d 139 (2d Cir. 2003). The Court also affirmed the District Court's order denying Sherrill leave to amend its answer to assert a defense of laches. *Id.* at 168-69. Sherrill petitioned for certiorari, raising arguments about the validity of the state transactions and reservation status, but not challenging this Court's laches ruling.

The Supreme Court reversed on "grounds not discretely identified" in the briefs. 544 U.S. 197, 214 n.8 (2005). The Court explained that "the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II*, is inextricably linked to, and is thus 'fairly included' within, the questions presented." *Id.*

The Court began with the observation that in *Oneida II* the Oneidas had "sought money damages only." 544 U.S. at 213 (citation omitted). "The Court reserved for another day the question whether 'equitable considerations' should limit the relief available to the present-day Oneidas." *Id.*; *see also id.* at 213 n.6 (citing the United States' position as amicus curiae in *Oneida II* regarding whether equitable considerations could limit relief). The Court distinguished rights, which it did not address, from remedies: "The substantive questions whether the plaintiff

has any right or the defendant any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." *Id.* at 213 (quoting Dobbs on the Law of Remedies). Treating the question of property taxation as a form of equitable relief based on the underlying Oneida land claim, the Court concluded that it could overturn the injunction against property taxation without affecting the underlying rights. *See id.* at 215 n.9 (distinguishing reservation status, which only Congress can change, from "recognition of present and future sovereign authority," which is "unavailable" as relief). The Court thus saw no need to, and did not review, various rulings by this Court that Sherrill and amici (New York State and Madison and Oneida Counties) had challenged concerning reservation disestablishment or the validity of the state transactions. Regardless of the Oneidas' rights, the Court concluded, the "long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks." *Id.* at 216-17.

The Court found support in three equitable doctrines (laches, acquiescence, and impossibility) linked by the general idea that "the passage of time can preclude relief," 544 U.S. at 217, but the Court did not purport to apply any one of those doctrines in terms, instead referring consistently to "equitable considerations"

concerning appropriate relief. *See id.* at 221 (facts "*evoke* the doctrines of laches, acquiescence, and impossibility") (emphasis added). With respect to the doctrine of acquiescence, which applies to territorial disputes between states, the Court was explicit that the doctrine was a "helpful point of reference," not a rule of decision. *Id.* at 218. With respect to laches, the Court did not refer to this Court's ruling denying leave to amend to raise a laches defense, 337 F.3d at 168-69, or to Sherrill's failure to seek review of the ruling, and did not purport to decide the case on the basis of the laches doctrine. *See* 544 at 221 n.14 (referring generally to a "non-statutory time limitation" rather than to laches).

The Court also went out of its way to make clear that it was not implicitly overruling *Oneida II*: "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." 544 U.S. at 221. By contrast, Justice Souter, in a lone concurrence, acknowledged the Court to have only limited available remedies, but contended that the equitable considerations noted by the Court operated on the Oneidas' rights, rather than solely on the available remedies. *Id.* at 222 (Souter, J., concurring) ("The Tribe's inaction cannot, therefore, be ignored here as affecting only a remedy to be considered later; it is, rather, central to the very claims of right made by the contending parties.").

I. The *Cayuga* Decision

After *Sherrill*, this Court requested supplemental briefing in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), in which the State had appealed an award of trespass damages and the Cayugas cross-appealed a ruling denying eviction of private landowners. A divided panel reversed the award of trespass damages, concluding that such an award was "disruptive" and could be dismissed under *Sherrill*, notwithstanding the line drawn in that opinion between money damages and injunctive remedies that "project redress for the Tribe into the present and the future." 544 U.S. at 202 & 221 n.14.

The *Cayuga* panel ruled that *Sherrill* freed the Court from Circuit precedent treating laches as categorically inapplicable to tribal land claims. 413 F.3d at 277 & n.6. *See also id.* at 274. At times, the Court also seemingly applied the same "equitable considerations" applied in *Sherrill*. Addressing the Cayugas' ejectment claim first, the Court concluded that the same equitable considerations applied because "this case involves comparably disruptive claims, and other, comparable remedies *are* in fact at issue." *Id.* at 274.

The possessory nature of the claim dominated the analysis. The Court tied the application of "equitable considerations" as in *Sherrill* to "[t]he nature of the claim as a 'possessory claim.'" 413 F.3d at 275; *see also id.* at 276 ("equitable defenses apply to possessory land claims of this type."), 277 ("We thus hold that

the doctrine of laches bars the possessory land claim presented by the Cayugas here.") (footnote omitted). After ruling that the disruptive effect of evicting current landowners doomed the Cayugas' claim for ejectment, the Court turned to the question whether trespass damages could be awarded. *Id.* at 278. The Court concluded that the unavailability of ejectment also precluded any relief dependent "on the possessory land claim." *Id.*

In dismissing the Cayugas' (and the United States') reliance on the District Court's finding (in calculating prejudgment interest) that the Cayugas had not unreasonably delayed in filing suit, the Court concluded that the award of prejudgment interest involved different equitable considerations from those at issue under *Sherrill*. 413 F.3d at 279. The Court determined that there was no need to remand, however, because the District Court had found that laches barred the ejectment remedy. *Id.* at 280. The Court described itself as *affirming* the District Court's own laches determination, *id.* at 277, and was careful to say that, while possessory land claims are categorically "subject to" the laches defense, a district court "could" (not must) dismiss for that reason, *id.* at 278.

J. The Defendants' Motion for Summary Judgment

The defendants moved for summary judgment on the basis of the decision in *Cayuga*. Even though the State argued in *Cayuga* that the Cayugas' remedy should be limited to the difference between the price paid by the State and the

money it made on resale, 413 F.3d at 271, the defendants' motion made no mention of a damages remedy for the Oneidas based on the State's underpayment. Indeed, the defendants went so far to avoid discussing fair compensation that, when they described the Oneidas' prayer for relief, they left out the paragraph seeking disgorgement of the State's profits on the sale. Defendants' Memorandum of Law in Support of Motion for Summary Judgment, (DE 582), at 3.

The Oneidas opposed the motion on two principal grounds, also preserving their position that *Cayuga* was wrongly decided.

First, the Oneidas argued that the fair compensation remedy is not "disruptive" because, unlike an award of trespass damages, it is not based on a continuing right of possession. Rather, fair compensation is the well-established remedy provided by the common law when equitable principles bar restoration of possession. The Oneidas submitted a declaration from an expert who had reviewed the State's records of the proceeds it obtained from the sales of Oneida land through 1827 to show that the State significantly underpaid the Oneidas. (A612-618; *see also* E700; E668-697; E1314-1482). The Oneidas also submitted supporting documentation, including contemporaneous state appraisals, and evidence that the underpayments continued after 1827, despite the enactment of a state law supposed to ensure that the Oneidas' received a fair price. (E1479; E1486-90; E1492; E1494-96; E1500; E1503).

Second, the Oneidas argued that, if *Cayuga* was an application of laches, then the Court had to consider unreasonable delay and resulting prejudice, and could not do so without discovery and hearing because the facts were in dispute. (*See* A604-618) (response to defendants' statement of material facts). The Oneidas submitted voluminous evidence that there was no unreasonable delay because the Oneidas could not have sued the State in state or federal court, and had diligently used other means to seek redress (A654-666). To show there was no prejudice resulting from delay, the Oneidas offered: (1) evidence that the land claim had not adversely affected land prices in the claim area, (A623-634), or prevented owners from obtaining title insurance (A620-22); and (2) evidence that the change of ownership and demographics in the area had nothing to do with delay in filing suit – these were contemporaneous with the original land sales, so that the interests of good faith purchasers from the State were already present two centuries ago at or near the time of the State's purchases. The Oneidas also demonstrated that the State had unclean hands, precluding it from invoking laches, because State officials knew the land purchases violated federal law and were intentionally at far less than the fair value. (A637-654). The Oneidas also submitted a declaration pursuant to Rule 56(f) identifying the additional discovery that would be required to resolve the disputed issues of material fact concerning laches. (A684-690).

K. The District Court's Summary Judgment Ruling

The District Court (Kahn, J.), granted the defendants' motion for summary judgment in part, and denied it in part. The Court held the trespass damages claim was barred. The Court concluded that laches as applied in *Cayuga* did not require the usual findings of unreasonable delay and resulting prejudice. (SPA13). To the contrary, the District Court found that "the Oneidas have diligently pursued their claims in various fora, and this [laches] finding does not, in any substantial part, rest on any supposed deficiency in the Oneidas' effort to vindicate their claims." (SPA14) (footnote omitted). Dismissal was required in any event, the District Court ruled, because "claims based on the Oneidas' possessory rights are disruptive to Defendants' rights and might also call into question the right of tens of thousands of private landowners and their legitimate reliance interests in the undisturbed use and enjoyment of their property." (SPA14-15). The Court declined the Oneidas' suggestion that, to avoid perceived disruption, it declare in its judgment that the award of damages does not in any way call into question the titles or possession of current landowners. Oneida Plaintiffs' Opposition, (DE 599), at 3.

The District Court concluded that *Cayuga* did not reach *non-possessory* claims. The Court recognized that the critical difference between damages for continuing trespass and fair compensation damages, which are for underpayment

back when land was purchased by the State, is that fair compensation damages do not imply that there is anything wrongful about current titles or possession. The District Court also rejected the defendants' argument that the Oneidas had not sufficiently alleged a claim for fair compensation.

In the process of explaining why the fair compensation claim was "consistent with Cayuga and the Federal Common Law," the District Court elaborated on the parameters of the fair compensation claim. The Court analogized fair compensation relief to reformation of an unconscionable contract. The Court reasoned that "[t]his type of claim seeks only retrospective relief in the form of damages, is not based on Plaintiffs' continuing possessory right to the claim land, and does not void the agreements." (SPA19). Accordingly, it is not disruptive. (*Id*.). The Court went on to discuss the Indian Claims Commission's application of similar remedies to tribes seeking redress for underpayments for land by the United States. (SPA20-27). Without deciding whether the Oneidas will have to meet the same standard for reformation applied in the Indian Claims Commission cases, or whether they can rely instead on the common law rule that "when equity bars restoration of land to a plaintiff after it has been transferred to innocent third parties, equity also requires a damage award for the difference between the price the defendant paid the plaintiff for the land and its true value when the defendant obtained it," (SPA27 n.8), the Court concluded the Oneidas had sufficient evidence

"to allow a reasonable jury to find in their favor" on a fair compensation claim. (SPA27). The District Court found "that Plaintiffs have adequately met their burden and have raised material facts as to the inadequacy of the consideration paid to the Oneida Indian Nation and the State's knowledge with respect to those payments." (SPA29).

SUMMARY OF ARGUMENT

I. Neither *Sherrill* nor *Cayuga* compels the denial of all remedies to the Oneidas, whether or not disruptive, and without regard to the facts other than the passage of time. Judge Kahn correctly held that the Oneidas are entitled to at least a fair compensation remedy. It is equitable, and exactly what equity requires, to order fair compensation when possessory remedies are deemed inequitable.

There was no fair compensation issue in *Cayuga*, because the Cayugas opposed an award of damages on that basis. *Cayuga* holds that laches is applicable to and can bar disruptive, possessory claims for relief that would unsettle property expectations and thus be disruptive to innocent landowners. There are good reasons to hold *Cayuga* to that scope. The Supreme Court, in both *Oneida II* and *Sherrill*, acknowledged the viability of the Oneida land claim and, at the same time, referred to or adopted rules that limit the remedies that might be awarded for the claim, never even hinting that there are no remedies and thus no claim. Further, Congress has expressed a clear intention that tribes have an opportunity to

obtain some form of relief for their land claims after federal inaction for so many years. 28 U.S.C. § 2415. Finally, the countervailing equities of the Oneidas, which must be taken into account under the rules of equity that underlie the *Cayuga* decision, compel a reading of *Cayuga* that preserves the equitable remedy of fair compensation. Fair compensation fits the equitable considerations identified in *Oneida II* and *Sherrill*. It is the least that can be done on a claim that has been recognized by the Supreme Court and proved in the test case.

Judge Kahn correctly held that the Oneidas' fair compensation claim is not disruptive, is not premised upon a continuing possessory interest, and is not subject to dismissal under *Cayuga.* To the contrary, fair compensation is the remedy recognized by the common law when equity bars restoration of possession because of intervening transfers to third parties. Equity does not deny all remedies when that can fairly be avoided. In *United States v. Minnesota*, 270 U.S. 181 (1926), and *Felix v. Patrick*, 145 U.S. 317 (1892), the Supreme Court recognized the fair compensation remedy specifically when equity barred restoration of Indian land to Indian possession. The remedy is one that is grounded in the federal common law rule of *Oneida II* and in the Nonintercourse Act. Judge Kahn could look to any common law remedies, be they found in tort, contract or otherwise, to guide him in formulating the fair compensation remedy for the admitted violation of the federal common law and the Nonintercourse Act. The Oneidas pleaded this claim, and it

is not barred by the State's Eleventh Amendment immunity because the United States asserts the same or comparable claims.

The State misunderstands the fundamental difference between fair compensation and the remedies held barred in *Cayuga*. Although the starting point for both is an Indian land transaction that violates federal law, the remedies diverge with regard to the very thing that the Court deemed "disruptive" in *Cayuga*: a continuing tribal possessory right. Trespass damages proceed from recognition, at least in theory, of a continuing tribal possessory right, while fair compensation damages proceed from a judicial determination that possession cannot be challenged.

II. Judge Kahn's dismissal of the Oneidas' trespass damages claim, without factual findings on the elements of laches and an exercise of his discretion regarding the same, and in the face of a finding of no Oneida fault regarding delay, should be reversed. Although Judge Kahn acknowledged ambiguity in *Cayuga* on the point, he incorrectly read the decision to compel dismissal of the Oneidas' trespass damages claim without analysis of any unreasonable delay and prejudice resulting from the delay, which are necessary elements of laches. The law in this Circuit is that a laches defense requires the defendant to prove both factual predicates, and nothing in *Cayuga* changes this law. Here, the State failed to assert, much less prove, either. Instead, the State argues circumstances comparable

to those relied upon by the Court in *Sherrill* as probative of laches. But *Sherrill* was not a laches decision and the circumstances did not establish the elements of laches.

The record here disproves the elements of laches. The Oneidas have not slept on their rights. Indeed, each court to consider the issue has concluded that the Oneidas diligently asserted their land claim in a variety of fora. Further, the Oneidas submitted undisputed evidence that there has been no prejudice to the State. The trespass claim has not affected property values or the ability to obtain title insurance.

III. *Cayuga* was wrongly decided, particularly if read to preclude all remedies for tribal land claims, thereby effectively overruling *Oneida II*. Further, *Cayuga* so read conflicts with Congress' will as expressed in 28 U.S.C. § 2415 that old land claims remain viable notwithstanding the passage of time. For these and the further reasons stated by the United States, the *Cayuga* decision should be reconsidered by this Court.

ARGUMENT

I. THE ONEIDAS' COMPLAINT PRESENTS A FAIR COMPENSATION CLAIM UNDER FEDERAL LAW THAT DOES NOT CALL INTO QUESTION EXISTING TITLES AND IS NOT DISRUPTIVE.

The District Court properly denied summary judgment with respect to the Oneidas' claim for fair compensation based on the difference between the price the State paid the Oneidas for their land and its true value, as reflected in the prices paid to the State when it sold the land at auction. That claim is grounded in a long-established equitable doctrine (which the defendants have never disputed) allowing recovery of fair compensation damages when a subsequent transfer to a third party prevents a court from granting rescission of an invalid transaction. *See United States v. Minnesota*, 270 U.S. 181, 215 (1926) (United States as trustee for a tribe could not equitably obtain possession but was instead "entitled to recover [the] fair value" of land illegally acquired by a state and subsequently sold by the state to a third party); *Felix v. Patrick*, 145 U.S. 317, 333-34 (1892) (heirs of tribal member could not equitably recover possession of land acquired with scrip that had been obtained illegally, as "justice requires only . . . the repayment of the value of the scrip, with interest thereon").

As this Court has explained, "in 1970, the Oneidas brought suit in the Northern District of New York claiming that the 1795 cession of land violated the Nonintercourse Act, and that the land was unconscionably purchased for an

inadequate price." 719 F.2d at 529; *see also* 434 F. Supp. at 537. The District Court correctly rejected the defendants' argument below that "recent legal developments" might compel the court "to close its doors now," even to a claim for fair compensation. Judge Kahn did "not believe that the higher courts intended to or have barred Plaintiffs from receiving any relief; to do so would deny the Oneidas the right to seek redress for long suffered wrongs." (SPA4). Principles of equity such as those invoked in *Cayuga* and *Sherrill* cannot lead to a result that, in the Supreme Court's words, "would be most inequitable" and "utterly indefensible on any moral ground," *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926) (awarding the tribe just compensation for land promised in a treaty when a subsequent transfer made it "impossible" to grant possession).

A. *Cayuga* is Limited to Disruptive Possessory Claims.

Cayuga is limited to claims for relief that imply a continuing tribal possessory right, 413 F.2d at 275, not a sweeping condemnation of all land claim remedies. The Court first separately considered the availability of ejectment, and then ordered dismissal of trespass damages claims as a logical consequence of that ruling. The Court discussed three connections between trespass and ejectment: (1) factually, the Cayugas had always sought ejectment (including on appeal) and received trespass damages as a judicially-crafted substitute; (2) doctrinally, trespass damages depend in principle on a determination that the current occupants

do not have a legal right of possession; and (3) logically, if refusing ejectment means there is no continuing possessory right, there can be no trespass when ejectment is barred. That reasoning does not apply to a non-possessory claim such as fair compensation.

First, the Oneidas sought disgorgement of the State's profits in their amended complaint in addition to other remedies, so it cannot be said that the claim to fair compensation depends on a demand for ejectment as a matter of pleading. Indeed, the Oneidas have always sought damages, not ejectment, as their preferred remedy, did not include ejectment of private landowners in their proposed amended complaint, and sought a declaration of possessory rights solely to avoid an argument that they had waived the possessory rights required for trespass by failing to assert them. *Second*, fair compensation does not depend doctrinally on a continuing possessory right; so it carries no potentially disruptive implied challenge to land titles. The opposite is true. Fair compensation is available when (and because) possession is not. *Third*, fair compensation does not logically depend on a continuing possessory right; the unavailability of ejectment is actually a predicate for a fair compensation claim, not an obstacle to it.

Cayuga also picks up the distinction drawn in *Sherrill* between retrospective relief and projecting relief "into the present and future." 413 F.3d at 275. Measured by that standard, an award of fair compensation is purely retrospective.

It squares up an old transaction, without altering any current or future rights with regard to the land.

Finally, the *Cayuga* holding does not apply to the Oneidas' fair compensation claim because there was no fair compensation claim before the Court in *Cayuga*. The defendants (including the State) argued that the Cayugas – if they were entitled to any relief on their claims – should be limited to the difference between the price the State paid and the value of the land. *Cayuga* Defendants' Br., at 217-222; *Cayuga* Defendants' Reply Br., at 90-91. The Cayugas rejected fair compensation, even as an alternative remedy, perhaps because the State had already paid the tribe the difference (albeit without any interest) in a 1909 settlement. *See People ex rel. Cayuga Nation v. Comm'rs,* 207 N.Y. 42 (1912). Consequently, the *Cayuga* panel had no occasion to consider fair compensation damages, and the opinion does not apply laches or equitable considerations to fair compensation.

B. *Cayuga* Cannot Be Extended to Fair Compensation.

1. Even if Equitable Considerations May Limit Certain Disruptive Relief, They Do Not Bar All Relief.

The State's brief equates laches with "equitable considerations" so as to stretch *Cayuga* to reach all land claim remedies, possessory or not, which is an extinguishment of liability. (*See, e.g.*, SBR13; 23-24; 29; 30). The characterization

of *Sherrill* as an application of laches (not equitable considerations) is critical to the State's analysis, because it allows the State to bypass the need for trial court findings of unreasonable delay and prejudice to dismiss outright (under the rubric of laches).

The Supreme Court has carefully distinguished the specific and well-defined doctrine of laches from equitable considerations limiting relief as applied in *Sherrill*. In *Oneida II,* the Court unequivocally affirmed the "finding of liability under federal common law," 470 U.S. at 251, after observing the remarkable circumstance that passage of time had not barred the Oneidas' claim. The Court responded in a footnote, *id.* at 254 n.27, to the United States' submission, as amicus curiae, that the Court should address "whether equitable considerations should limit *the relief available* to the present-day Oneida groups," 1984 WL 566161, at *33 (U.S. amicus brief) (emphasis added). Among several alternatives to ejectment, the United States discussed "whether it would be appropriate to award a money judgment based on all or a portion of the value of the Tribes' extinguishable possessory interest in the land or a money judgment in some other amount if it appeared that the State had paid inadequate consideration for the land or realized a profit from its subsequent disposition to settlers." *Id.* at *40.

The *Oneida II* Court could not have been clearer that limiting relief did not mean denying all relief. The Court's footnote discussing equitable considerations

drops directly from the sentence affirming "the finding of liability under federal common law," 470 U.S. at 254. The Court did not suggest that equitable considerations could nullify that very finding of liability by foreclosing relief. *Cf.* Fed. R. Civ. P. 12(b)(6) (dismissal for failure to state a claim upon which relief may be granted).

Nothing in *Sherrill* erased the distinction between laches, which can bar liability (if applicable and proved), and equitable considerations shaping relief. The Court tied its discussion of remedy to the equitable considerations footnote in *Oneida II*, 544 U.S. at 213 & n.6 (citing 470 U.S. at 253 n.27), not to the Court's separate discussion of laches in *Oneida II*. *See* 470 U.S. at 244 & n.16. It could hardly have been otherwise. Sherrill did not raise in the Supreme Court, and therefore abandoned, its challenge to the ruling below that it could not assert a laches defense. *See* 337 F.3d at 168-69 (affirming denial of leave to amend Sherrill's answer to assert laches).

The Supreme Court was not applying laches when it referred to laches, acquiescence, and impossibility as expressing the "principle that the passage of time can preclude relief." 544 U.S. at 217. The Court did not purport to apply any of the three doctrines independently to the facts. Indeed, the Court was clear that the doctrine of acquiescence, which applies to state boundary disputes under the Court's original jurisdiction, does not apply to tribal claims. *Sherrill* is no more a

laches case than it is an acquiescence case. It rests on equitable considerations "evoke[d]" by the three doctrines, but not governed by any of them.

Far from implicitly overruling the liability finding in *Oneida II* and the award of a money damages remedy, the Court was explicit that the limitation on relief in *Sherrill* has no bearing on "the question of damages for the Tribe's ancient dispossession," which had been decided in *Oneida II.* 544 U.S. at 221. *Sherrill*, therefore, cannot be read as questioning the continued viability of the Oneida land claim or as supporting a rule that all remedies for the claim are barred by the passage of time.

2. A Federal Common Law Rule Effectively Barring All Old Land Claims Conflicts With the Express Will of Congress.

The rule sought by the State here would bar all relief in tribal land claims based on the passage of time and without regard to the necessary elements of laches – unreasonable delay and prejudice resulting from that delay. Such a rule is not permissible in the face of Congress' clear intention that tribes have some form of relief in old tribal land claims.

In *Oneida II*, the Court considered whether to adopt a state statute of limitations to bar the Oneida land claim. The Court found two acts of Congress reflecting a policy that precluded the borrowing of a state statute of limitations because they would bar Indian land claims in the face of Congressional decisions

to avoid time bars. 470 U.S. at 241. The federal policy embodied in these federal statutes also precludes the application of a judicially crafted time bar that would extinguish tribal land claims altogether.

The Court noted that when Congress conferred certain state civil and criminal jurisdiction over Indian reservations in New York, it specifically exempted Indian land claims to avoid state time bars. 470 U.S. at 241 (25 U.S.C. § 232). The Court also concluded that Congress had "reaffirmed" its "policy against the application of state statutes of limitations in the context of Indian land claims" when it enacted and then repeatedly amended 28 U.S.C. § 2415, a statute of limitations on certain claims, including land claims filed by the United States on behalf of tribes.[11] Section 2415 is particularly probative of congressional policy with respect to the Oneida claim because it was among the old claims specifically discussed in congressional hearings on the statute. Congress knew that New York, along with other eastern states, faced large land claims dating back to the 18th century and considered arguments that time and changes in demographics and governance made the claims too disruptive to proceed.[12] When Congress extended

[11] The current version of the statute is reproduced at SPA105-106. Selections from the history of the various amendments to the statute, and Congress' rejection of related legislation that would have resolved "ancient" land claims, including the Oneidas', are reproduced at E4413-4806.

[12] *See e.g.*, E4511; E4513; E4520 (testimony of Maine attorney general referring to litigation involving 60% of the total land in the state); *id.* (committee chair notes

§ 2415 to certain suits by the tribes, it left the door open for claims listed in the Federal Register until a year after the Secretary of the Interior decided not to bring the claim in the name of the United States. There is no question that the Oneidas' claim is among those Congress preserved. 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983) (listing claims preserved until one year after federal government review is completed.) The Oneidas filed suit before the list was published and before the federal government completed its evaluation of the claim.

Thus, Congress established an administrative mechanism that was "intended to give the Indians one last opportunity to file suits covered by [§ 2415(a) and (b)] on their own behalf." 470 U.S. at 244. Of course, Congress did not address which remedies might be available in its deliberations on the claims, but its deliberations plainly show the presumed existence of claims for some remedy.

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that representative of New York was invited because of similar claims there); E4552 (committee report noting that "[m]any of these claims go back to the 18th and 19th centuries"); E4565 (statement of Rep. Cohen, referring to the impact of land claims and specifically to the Oneida land claim as being "for approximately 240,000 acres and will affect a minimum of 20,000 defendants"); E4592; E4675 (testimony of Sen. D'Amato advocating proposed legislation to retroactively ratify land sales and referring to the Oneida claim). Congress also knew that the Bureau of Indian Affairs had "failed to live up to its responsibilities as trustee for the Indians," 470 U.S. at 244, by pursuing land claims on the tribes' behalf. Despite protests from state officials (and congressional delegations) about the disruptive effect of such land claims, Congress first extended the period of limitations to give the bureau additional time to review claims, and then gave the tribes time to file on their own after the United States declined to bring a claim.

The federal common law rule proposed by the State – one that would bar all remedies for tribal land claims without regard to the elements of laches – would violate Congress' expressed will. *See* 470 U.S. at 244 ("[I]t would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances."); *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259-60 (2d Cir. 1997) (legislative policy judgment reflected in statute of limitations cannot be altered by laches).[13]

The sole reference to § 2415 in *Cayuga* appears in the discussion of the applicability of laches to the United States. 413 F.3d at 279. The Court concluded that laches can be applied to the United States because § 2415 was not enacted until 1966, "—i.e., until one hundred and fifty years after the cause of action accrued," implying that the statute of limitations is inapplicable. In fact, Congress made it clear that § 2415 applies to old claims not previously governed by any statute of limitations, which were expressly "deemed to have accrued on the date

[13] Ordinarily, when Congress has not provided a limitations period for a federal right of action, whether statutory or common law, the courts incorporate or "borrow" the limitations period applicable to the most closely analogous state right of action. *Wilson v. Garcia*, 471 U.S. 261 (1985). The issue in *Oneida II*, in light of this general rule, was not whether state limitations periods applied to the Oneidas' federal common law action by their own force (they clearly did not) but rather whether it was proper to import those same limitations periods into the federal common law. The answer was no because of the federal policy against a time bar on the old land claims.

of enactment of this Act." 28 U.S.C. § 2415(g).[14] Thus, the Oneidas' claims accrued no sooner than 1966 and are timely under the applicable statute of limitations. They are not subject to dismissal on the basis of a judge-made rule in conflict with the judgment of Congress that tribes should have "one last opportunity to file suits covered by [28 U.S.C. § 2415(a) and (b)] on their own behalf." 470 U.S. at 244.

3. Fair Compensation is Equitable.

Even if equitable considerations reached non-possessory remedies for tribal land claims, there is no basis for dismissing the Oneidas' fair compensation claim as inequitable. Equity is not broadly categorical in the manner of a statute; it applies a test of fairness to the particular circumstances of the case. *eBay, Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837, 1840 (2006). The circumstances here establish the fairness of the Oneidas' fair compensation claim.

[14] The text and history of § 2415 also show why the United States' lack of diligence in seeking relief for the Oneidas cannot be a basis for dismissing the Oneidas' claims. Time bars, including laches, do not apply to the United States as sovereign, and even if they did, Congress determined that the tribes should not be penalized. "The legislative history of the successive amendments to § 2415 is replete with evidence that the United States had failed to live up to its responsibilities as trustee for the Indians, and that the Department of the Interior had not acted with appropriate dispatch in meeting the deadlines provided by § 2415." 470 U.S. at 244. Rather than cutting off tribal claims, Congress chose to give the United States additional time to review them.

The record before the District Court in this case shows that the State intentionally cheated the Oneidas, beginning with the first and largest purchase in 1795, and continuing through at least 1827, the last purchase before the State adopted a formal policy of paying the full value of the land (even if it frequently paid less in reality). (*See* pp. 6-9, *supra*). It also shows that in 1795 and thereafter, State officials, including the Governor and the State's lead negotiator, were aware of the need for a federal commissioner and federal approval by treaty, but chose to proceed in violation of federal law. (*See* pp. 7-8, *supra*). Such intentional wrongdoing, including the commission of a criminal offense in negotiating a treaty without a federal commissioner, constitutes unclean hands precluding a party from asserting, much less prevailing on, a laches defense. *See Stone v. Williams,* 891 F.2d 401, 404 (2d Cir. 1989); *Hermes Int'l v. Lederer de Paris Fifth Ave.,* 219 F.3d 104, 107 (2d Cir. 2000).

The State exploited the Oneidas' poverty, lack of sophistication and weakness. The record shows, that after the Oneidas returned home from their alliance with the United States during the Revolutionary War, they found devastation, hunger and poverty that drove them to seek an income by leasing some of their land. They succumbed to persuasion by non-Indians in 1795 because the State refused to allow leases and a winter without adequate food supplies loomed. Then, non-Indian settlers cleared the forest, leaving the Oneidas with

diminished hunting and fishing grounds. The State failed to repel encroachments onto Oneida land, and bribes and liquor were used to procure additional land cessions. (*See* pp. 7-9, *supra*).

Finally, there is nothing inequitable about the Oneidas' first filing suit in 1970 and joining the State in 1998. The record shows that the Oneidas could not sue the State at all because of its sovereign and Eleventh Amendment immunity, and had no practical recourse to recover land or compensation in state or federal court until the Supreme Court in 1974 agreed they had a claim arising under federal law. (*See* pp. 11-13, *supra*). The District Court explicitly found no "deficiency in the Oneidas' efforts to vindicate their claims." (SPA14). *See generally* Brief of the National Congress of American Indians as Amicus Curiae (discussing obstacles to tribal suits).

C. The District Court Correctly Denied Summary Judgment on the Oneidas' Fair Compensation Claim.

The State contends that the fair compensation claim "would have to be dismissed because there is no such federal common law cause of action." (SBR48). The State is incorrect. The Oneidas' fair compensation claim is a non-possessory remedy for the State's acquisition of Oneida land in violation of the Nonintercourse Act that is firmly grounded in the federal common law. The Oneidas pleaded the claim.

1. The Federal Common Law Provides a Claim For Fair Compensation When Equity Bars Rescission of an Unlawful Transaction.

As the Supreme Court explained in *Oneida I*, the extinguishment of Indian title is governed exclusively by federal law under the Constitution. 414 U.S. at 670. Federal law thus completely preempts state law with respect to Indian land claims. *First Am. Casino Corp. v. E. Pequot Nation,* 175 F. Supp. 2d 205, 209 (D. Conn. 2000); *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 393 n.8 (1987) (citing *Oneida I* as an example of "complete preemption"). As a consequence, the federal courts apply federal common law as the source for rights of action that in the more typical case would be governed by state law. 414 U.S. at 674 ("the governing rule of decision would be fashioned by the federal court in the mode of the common law"). The holdings of *Oneida I* and *Oneida II* were not narrowly limited to the particular claim for trespass damages made in the test case and would include any remedy – including fair compensation – based on the acquisition of federally protected tribal land without the requisite approval.

The application of federal common law to provide a fair compensation remedy for land that was unlawfully transferred from Indian possession, but cannot be restored because of a later transfer to an innocent third party is illustrated by *United States v. Minnesota,* 270 U.S. 181, 215 (1926), and by *Felix v. Patrick,* 145 U.S. 317, 333-34 (1892).

In *United States v. Minnesota*, the state illegally acquired tribal lands decades before the suit. As to remedy, the Court distinguished between land that had already been sold to third parties and land remaining in the State's possession. It concluded that "the United States is entitled to a decree cancelling the patents for such as have not been sold by the state and charging her with the value of such she has sold." 270 U.S. at 215. The Court restored to the tribe the land the state retained. Because the land sold to third parties could not be restored, the tribe was entitled to the state's proceeds from the sale.

In *Felix*, the Court rejected on the basis of laches the claim of an Indian allottee's heirs to possession of certain land in downtown Omaha that had been acquired with federal scrip conferring land rights illegally purchased from an Indian. The Court concluded that it would be inequitable to give the heirs possession of the land. Rather than possession, "[j]ustice requires only what the law. . . would demand – the repayment of the value of the [illegally conveyed] scrip with interest thereon." 145 U.S. at 334.

In a related context, the Supreme Court has ruled that because the Yankton Sioux could not obtain possession of land promised to them in a federal treaty, the tribe was entitled to just compensation for the value of the land from the United States. *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357-59 (1926).

It is no coincidence that two of the cases relied on in *Sherrill* as support for time-based equitable limitations on remedy (*Felix* and *Yankton*) also recognize that equity provides a remedy based on fair compensation when other remedies are deemed inequitable. Indeed, it would be a strange set of equitable considerations that would leave a tribe without any remedy; as the *Yankton* Court put it, it "would be most inequitable" and "utterly indefensible upon any moral ground" to deny all relief. *Id.* at 357.

Fair compensation is the remedy awarded when an unlawful transaction cannot be rescinded for equitable reasons. For example, in *Porter v. O'Donovan*, 130 P. 393, 395-97 (Ore. 1913), the defendants wrongfully obtained a deed from the plaintiff. The court set aside the conveyance of the land that the defendants retained but would not restore the plaintiff to the land that had been sold "to an innocent purchaser." *Id.* at 396. The court ordered the defendants to pay damages equal to the value received on re-sale of the property and the plaintiff to return such funds as defendants had paid him. *Id.* at 396-97; *accord Townsend v. Vanderwerker*, 160 U.S. 171 (1895) (plaintiff cannot get land because of third-party rights, but can get land's value); *Pratt v. Law*, 13 U.S. 456, 494 (1815) (damages where specific performance impossible); *Hart v. Ten Eyck*, 2 Johns. Ch. 62 (N.Y. 1816) (where land re-sold to third parties, it could not be restored to plaintiffs but defendant ordered to provide plaintiff value of land at the time of

defendant's acquisition); *Warner v. Daniels*, 29 F. Cas. 246 (C.C.D. Mass. 1845) (damages if reconveyance impossible because of third-party rights); *Holland v. Anderson*, 38 Mo. 55 (1866) (same); *Daiker v. Streitlinger*, 50 N.Y.S. 1074 (App. Div. 1898) (same); *Jackson v. Counts*, 106 Va. 7 (1906) (damages from defendant who procured deed, but no recourse against good faith purchaser); *Bailey v. Morgan*, 438 N.Y.S.2d 615 (App. Div. 1981); *Simon v. Marlow*, 515 F. Supp. 947 (W.D. Va. 1981); *see generally Glick v. Campagna*, 613 F.2d 21, 36-37 (3d Cir. 1979) (defendant not ordered to return stock where it had been resold to third party but ordered to pay damages equal to profit on re-sale); *Woodcock v. Bennet*, 1 Cow. 711 (N.Y. 1823) (where award of profit on re-sale of land is ordered, laches irrelevant because land's value when wrongfully obtained is measure of damages and value of later improvements not in issue).

2. The Fair Compensation Claim Is a Remedy for the State's Violation of the Nonintercourse Act.

The law in this circuit is clear that the Nonintercourse Act, an act intended to benefit Indian tribes, supports an implied right of action by tribes for violation of the statute. Further, the Court made plain that the implied statutory right does not require or depend upon a continuing right of possession. An implied statutory right of action is made out upon proof of four elements: (1) the plaintiff is an Indian tribe; (2) the land at issue was tribal land at the time of the conveyance; (3) the United States never approved the conveyance; and (4) the trust relationship

between the United States and the tribe has not been terminated. *Seneca Nation of Indians v. New York,* 382 F.3d 245, 258 (2d Cir. 2004); *Golden Hill Paugussett Tribe of Indians v. Weicker,* 39 F.3d 51, 56 (2d Cir. 1994); 719 F.2d at 537. There is no authority that the implied statutory right of action necessarily requires a possessory-based remedy. To the contrary, the Act "does not speak directly to the question of remedies for unlawful conveyances of Indian land." *Oneida II,* 470 U.S. at 237.

Under these circumstances, courts can look to any common law remedy for a violation of the Nonintercourse Act: "[W]e presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. . . . [I]f a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60, 66, 69 (1992); *see also Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957) (remedy for implied right under the National Labor Relations Act); *Sola Elec. Co. v. Jefferson Elec. Co.,* 317 U.S. 173 (1942) (remedy for implied right of action under the Sherman Anti-Trust Act). This is particularly appropriate where the statute codified a common law rule, as the Nonintercouse Act does the federal common law restraint against alienation without the United States' consent. *See D'Oench, Duhme & Co. v. Fed. Deposit*

Ins. Corp., 315 U.S. 447 (1942); *Co-Star Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 553 (4th Cir. 2004).

In selecting the appropriate remedy, courts are guided by the purposes of the statute in question and adopt remedies designed to effectuate those purposes. *Cont'l Mgmt., Inc., v. United States*, 527 F.2d 613, 617 (Ct. Cl. 1975); E. Chemerinsky, *Federal Jurisdiction,* § 6.3 (3d ed. 1999). A primary purpose of the Nonintercourse Act was to prevent Indian tribes from being cheated out of their land. *Fed. Power Comm'n v. Tuscarora Nation*, 362 U.S. 99, 119 (1960).

The fair compensation claim made by the Oneidas is precisely tailored to the purpose of the Nonintercourse Act, if possessory-based remedies are no longer available. Congress requires federal supervision of transactions affecting Indian land to avoid "improvident" disposition of Indian lands. *Tuscarora*, 362 U.S. at 119. An award of fair compensation damages deprives the State of the enormous profit it realized by its repeated and knowing violation of the Nonintercourse Act. As a result, the Oneidas' fair compensation claim, which is neither possessory in nature nor disruptive in effect, is an appropriate remedy for the Oneidas' implied right of action under the NIA. *See SEC v. Cavanagh*, 445 F.3d 105, 116-20 (2d Cir. 2007) (availability of disgorgement to remedy a violation of statute regulating securities); *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 118 (2d Cir. 1990) ("Restitution for unjust enrichment is not provided by federal

statute. Its availability is part of the federal common law relating to statutory violations"); *Intergen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003) ("federal common law incorporates general principles of contract and agency law"); *Riley v. Empire Airlines, Inc.*, 823 F. Supp. 1016, 1020 (N.D.N.Y. 1993) (on availability of punitive damages for violation of the Railway Labor Act, "a court must presume the availability of all appropriate remedies unless Congress has express indicated otherwise").

3. Any Remedy Adopted to Vindicate the Oneidas' Federal Rights Is Governed by Federal Law, Whether Considered a Contract, Tort, or Other Remedy.

The District Court's discussion of contract reformation as a basis for awarding fair compensation falls within the remedial powers of the Court under federal common law. Contrary to the State's position, the characterization of the Oneidas' fair compensation claim as tortious or contractual is unimportant.[15]

[15] For example, breach of contract claims involving ERISA-regulated benefit plans are governed by federal common law. *See Pilot Life, Ins. Co. v. Dedaux*, 481 U.S. 41, 48 (1987): *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63 (1987). See also *Nippon Fire & Marine Ins. Co. v. Skyway Freight Sys., Inc.*, 235 F.3d 53, 59 (2d Cir. 2000) (applying federal common law to govern claims against air carriers for loss of cargo in transit and analyzing contractual limitations of liability under federal common law as applicable to tort and bailment as well as contract claims); *Eli Lilly Do Brasil v. Fed. Express Corp.*, 502 F.3d 78, 80 (2d Cir. 2007) (applying federal common law to determine choice-of-law in claim against air carrier for loss of cargo.)

Reformation of an unapproved (and therefore invalid) state treaty, or "contract," to acquire Indian land by requiring payment of fair compensation is an appropriate federal common law remedy. Reformation is available under the common law generally, and not only under precedents of the Indian Claims Commission, such as those discussed by the District Court. (*See* SPA20-27). For example, in *Blake Constr. Co. v. United States,* 295 F.2d 393, 397 (D.C. Cir. 1961) (Burger, J.), the court remanded for an independent judicial determination on whether a government contract should be reformed. *Calmar S.S. Corp. v. Scott,* 345 U.S. 427, 435 (1953), involved a claim for reformation of a contract governed by federal admiralty law. *Perkins-Campbell v. United States,* 264 U.S. 213 (1924), denied reformation of a contract to supply harnesses during the First World War. *Ackerland v. United States,* 240 U.S. 531 (1916), granted reformation of a government contract to transport coal to the Philippines.

The State argues that "this Court rejected the notion that federal common law governs contracts that must be approved under the Nonintercourse Act." (SB51) (relying on *Niagara Mohawk Power Co. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747 (2d Cir. 1996)). There is nothing in *Niagara Mohawk* that conflicts with the Supreme Court's holding that "[o]nce the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law," *Oneida I,* 414 U.S. at 667, subject to

rules of decision "fashioned by the federal courts in the mode of the common law." *Id.* at 674. To the contrary, *Niagara Mohawk* assumed that a dispute over the validity of the franchise agreement under the Nonintercourse Act would state a federal claim, but found there was no such dispute. 94 F.3d at 753. The Court rejected a different proposition: that a statutory federal approval requirement turned all disputes about contract interpretation not implicating any federal interest into a federal question. The Court cited cases involving commercial contracts subject to approval under 25 U.S.C. § 81 and IGRA, 25 U.S.C. § 2701 *et seq.*[16] That holding has nothing to do with whether remedies for the acquisition of tribal land in violation of federal law are subject to complete preemption and governed by federal common law.[17]

[16] The cases relied upon by this Court in *Niagara Mohawk*, and by the State in its brief, include: *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980) (validity of construction contract under statute regulating contracts with Indian tribes, 25 U.S.C. § 81); *Tamiami Partners v. Miccosukee Tribe*, 999 F.2d 503 (11th Cir. 1993) (validity of commercial contract under Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*).

[17] The State also cites two other cases in an effort to avoid use of contract remedies. Neither holds that a claim under the Nonintercourse Act is not governed by federal law. *United States ex rel. St. Regis Mohawk Tribe v. President R.C.*, 451 F.3d 44 (2d Cir. 2006), involved the validity of a commercial contract under the Indian Gaming Regulatory Act. *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945 (9th Cir. 2004), involved enforcement of an arbitration provision in a lease where no question regarding validity of a lease under the Nonintercourse Act was presented.

The particulars of contract or other remedies for the Oneidas' fair compensation claim are beyond the scope of this interlocutory appeal. The District Court did not decide whether the Oneidas may seek fair compensation as relief under the equity rule precluding the availability of possessory relief, as a contract reformation remedy, or both. There was no litigation below on the contours of the fair compensation claim. The only thing that matters for purposes of this interlocutory appeal is that the Oneidas have a viable fair compensation claim that is not "possessory" and the District Court should be affirmed for so holding.

4. The Oneidas Sought Fair Compensation in their Amended Complaint, and the Claim Is Not Barred by the State's Immunity from Suit.

The Oneidas' complaint seeks fair compensation based on the State's gains from its underpayment of Oneida land. (A207, A220, A230). It does not matter that the Oneidas, in light of the clear holding of this Court and the Supreme Court in the test case, have also for many years pursued trespass damages based on a continuing possessory right as well as fair compensation. *Oneida II*, 470 U.S. 226; 719 F.2d 525. The Oneidas pleaded the additional fair compensation claim and, as established above, federal law provides for such a claim. [18] Nothing else is necessary. *See* Fed. R. Civ. P. 8(c) (alternative claims).

[18] In the District Court, the defendants misrepresented an interrogatory response to support their claim that the Oneidas had not sought fair compensation. Defendants' Reply Memorandum, (DE606), at 6. As the full interrogatory

Even if the District Court's order permitting the claim for fair compensation were deemed to have allowed an amendment of the complaint to add a fair compensation claim, there would be no error, much less a reversible abuse of discretion. (*See* A788 (Oneidas' statement at argument on summary judgment that pleading issues could easily be resolved by granting amendment)). At a minimum, the District Court in the first instance should decided whether to permit the Oneidas to amend their complaint in light of developments since the complaint was filed, just as it effectively permitted the defendants to amend their answers to plead a defense based on *Cayuga* and *Sherrill*. *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1087 (2d Cir. 1993) (complaint "constructively amended" to include federal claim because parties had briefed federal claims and trial court had decided federal issues); Fed. R. Civ. P. 15 (liberal amendment).

Finally, the United States' complaint also seeks fair compensation for the Oneidas. (A778-782). Although the United States' amended complaint does not refer to fair compensation in those terms, it does include a prayer for such other relief as is justified by the claims, which would certainly include fair compensation based on the same equitable principles invoked by the Oneidas, in the event that

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response (E1211) explained, neither the federal common law nor implied statutory rights of action depend on proof of inadequate compensation. The fair compensation claim is for a particular remedy, when possessory remedies are not available. The Oneidas provided extensive information regarding the State's underpayment in response to an earlier interrogatory. (E1172-77).

relief based on a continuing possessory right is denied. The federal government has a well-established right to seek disgorgement of profits obtained in violation of federal law, including the State's profits from unlawful Oneida land transactions. *See SEC v. Cavanagh*, 445 F.3d 105, 116-20 (2d Cir. 2007). The United States has sued to enforce the NIA, and the profits obtained by the State in violation of the Act are subject to disgorgement for the Oneidas' benefit. The United States' entitlement to disgorgement is identical to the Oneidas' fair compensation claim so there is no distinct sovereign immunity interest that would protect the State fisc from the Oneidas' demand. *See Seneca Nation v. Pataki*, 178 F.3d 95 (2d Cir. 1999) (per curiam).

II. SUMMARY JUDGMENT DISMISSING THE ONEIDAS' TRESPASS DAMAGES CLAIM MUST BE REVERSED SINCE DEFENDANT FAILED TO ESTABLISH UNREASONABLE DELAY OR RESULTING PREJUDICE.

The District Court read *Cayuga* to allow summary judgment based on laches without an evidentiary hearing, findings on the elements of laches or an exercise of discretion. The Court acknowledged the ambiguity of the *Cayuga* decision on this score: on the one hand, it noted that the *Cayuga* decision could be read to require an evidentiary hearing on a laches defense (SPA14); on the other hand, it concluded that the *Cayuga* panel read *Sherrill* to mandate judgment on trespass damages claims without regard to the factual showing required to sustain a laches

defense. (*Id.*). The Court committed reversible error in so concluding. The law requires that a defendant asserting laches prove unreasonable delay on the part of plaintiff and prejudice to defendant resulting from that prejudice. The State failed to even assert either and the record contains abundant evidence that the Oneidas did not delay and the State has not been prejudiced by delay.

A. The District Court Committed Reversible Error of Law in Granting Judgment on Defendant's Laches Defense Without an Analysis of Relevant Facts.[19]

Laches is an equitable defense, applied in the trial court's discretion, upon a showing of unreasonable delay and resulting prejudice. *Thom v. Ashcroft,* 369 F.3d 158 (2d Cir. 2005); *Merrill Lynch Managers v. Optibase, Ltd*, 337 F.3d 125 (2d Cir. 2003) (per curiam); *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998); *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187 (2d Cir. 1996). *See also* 2A Carmody-Wait 2d, New York Practice § 13:55; Black's Law Dictionary 891 (8th ed. 1999); 27A Am. Jur. Equity § 140 at 618 (1996). The defendants did not claim, much less prove by undisputed facts, that the Oneidas unreasonably delayed or that the defendants were prejudiced as a result of delay. Defendants' Memorandum of Law, (DE582), at 25-26; Defendants' Reply Memorandum,

[19] This Court ordinarily reviews rulings on laches for abuse of discretion. *Perez v. Danbury Hospital,* 347 F.3d 419, 426 (2d Cir. 2003). Here, Judge Kahn declined to exercise discretion since he read *Cayuga* to compel judgment against the Oneida trespass damages claim without an evidentiary hearing and regardless of his assessment of relevant facts regarding fault and prejudice. This constitutes an error of law. *Cooter & Gell v. Hartmax, Corp.,* 496 U.S. 384, 405 (1990).

(DE606), at 14. Instead, both the defendants and the District Court treated both unreasonable delay and prejudice as irrelevant, converting laches into a bar to claims based solely on the perceived disruptiveness of the remedy.

The Supreme Court was clear in both *Sherrill* and *Oneida II* that laches and equitable considerations are different. In *Oneida II*, the Court affirmed the award of trespass damages to the Oneidas, reserved on the availability of laches (while expressing doubt about its availability in response to the dissent), and also separately held that whether equitable considerations should limit remedies to the claim remained an open question. 470 U.S. at 240, 244 n.16, 253 n.27. The Court made plain that it understood laches (if applicable and proved) as a bar to the claim and equitable considerations as relevant, if at all, to the formulation of remedies.

In *Sherrill*, the Court expressly took up the question of whether equitable considerations were available to limit relief and declined "to project redress for the Tribe in the present and future, thereby disrupting the governance of central New York's counties and towns." 544 U.S. at 202.

Sherrill carefully distinguished between the existence of a federal claim for relief, as affirmed in *Oneida II*, and the appropriate remedies by which to vindicate that right. 544 U.S. at 213-14. It found that equitable doctrine such as laches, acquiescence and impossibility together evoked a general principle that made the claimed remedy inequitable. *Id.* at 221. Thus, the Court was able to foreclose the

particular remedy before it in the absence of an evidentiary proceeding below and, at the same time, leave its *Oneida II* holding undisturbed. *Id*. In other words, the Court in *Sherrill* simply took up the invitation in *Oneida II* to consider equitable limitations on remedies. The Court in *Sherrill* did not apply laches and cannot be read to "mandate" the application of laches here without regard to the fact-bound elements of laches.[20]

There is no doubt that the *Cayuga* decision at times treats laches and *Sherrill*'s equitable considerations interchangeably, which could suggest that the Court understood them to be one and the same. But the Court also affirmed a district court laches finding, which would have been unnecessary if the decision were based upon equitable considerations. 413 F.3d at 277-278. *Cayuga* also implies that dismissal was discretionary, consistent with the rules governing laches. *Id.* at 277 (district court must address claims as "subject to the defense of laches under *Sherrill* and could dismiss on that basis"). Finally, there is nothing in the *Cayuga* decision indicating that the panel intended to overturn the substantial body of law in the circuit holding that application of laches is vested in the district court's discretion and depends upon a factual showing of unreasonably delay and

[20] Had the Supreme Court based its decision on laches in *Sherrill*, the Court would have been obliged to address its earlier skepticism about the availability of that defense in *Oneida II*. 470 U.S. at n.16.

prejudice resulting from that delay.[21] Perhaps most importantly, reading *Cayuga* as applying laches, as opposed to some equitable considerations, would not necessarily be at odds with *Oneida II*, while reading it to apply equitable considerations to trespass damages would be at odds with *Sherrill* and *Oneida II*.

Instead of undertaking the inquiry required by the law governing laches, the District Court made three determinations, which tracked those found determinative in *Sherrill* to justify an equitable limitation on the remedies sought by the Oneidas: significant lapse of time between the illegal transactions and Oneida efforts to regain possession of the land; the transformation of the area into one predominantly non-Oneida; and the non-Indian development of the claim area. (SPA 10-12). The first determination is not a finding of unreasonable delay and the record would not support such a finding (indeed, the Court found no fault). The second and third determinations are not prejudice resulting from delay, since good faith improvements are an offset against the trespass damages claim and the changes occurred immediately after the violations, not because of delay.[22] Neither

[21] *Cayuga* did read *Sherrill* to indicate for the first time that the laches defense is available against tribal land claims. *See Cayuga*, 413 F.3d at 277 n.6 ("The *Sherrill* opinion effectively overruled our Court's holding in *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1084 (2d. Cir. 1982), that laches and other time-bar defenses are unavailable….") There is nothing in *Cayuga* even hinting that *Sherrill* changed the rules governing the laches defense.

[22] This Court held in the Oneida test case that trespass damages are to be offset by the value of improvements made in good faith. 719 F.2d at 541.

can the fact of transfer to non-Oneidas constitute prejudice. Transfers to innocent third parties are governed by a different equitable rule, not laches, a rule that provides fair compensation when possession would be inequitable. In short, the District Court failed to make the necessary factual inquiry to support a laches ruling, and its decision to dismiss the trespass damages claim should be reversed.

B. The Record Shows that the Oneidas Have Not Unreasonably Delayed in the Assertion of their Claims and There Has Been No Prejudice Resulting from Delay in Filing Suit.

This Court has already observed in the Oneida test case that the Oneidas made diligent efforts to assert their land claims:

> New York's abuse of the Oneidas was not accomplished without protest. Shortly after the 1784, 1787, and 1788 land purchases, the Oneidas contacted the federal government in protest over what they perceived as improper, deceitful, and overreaching conduct by the State. Their protest continued, especially between 1840 and 1875, and between 1909 and 1965….

719 F.2d at 529 (citation omitted). The District Court agreed, observing that judgment against the Oneida trespass damages claim did not "in any substantial part, rest on any supposed deficiency in the Oneidas' efforts to vindicate their claims." (SPA 14).[23]

[23] That the Oneidas did not sue earlier does not show unreasonable delay, because the Oneidas could not sue under applicable precedent in either state or federal court until 1974. Moreover, the Oneidas could not sue the State for damages at all until joined by the United States. *Compare Robins Is. Preservation Fund, Inc. v. Southhold Dev. Corp.*, 959 F.2d 409, 421-22 (2d Cir. 1992) (no excuse or

Neither did defendants show (or attempt to show) prejudice as a result of delay in filing suit. They did claim "disruption," but their summary judgment papers make it clear that the asserted disruption is based on the transfers of Oneida land to non-Indians by the State following the various state transactions. Those sales began in 1797, and generally took place very soon after the state transactions, so that the same claim of disruption based on non-Indian possession, development and "character" (which is not prejudice) could have been made in 1800. The Oneidas presented evidence that the usual form of prejudice asserted – that trespass damages claims harm land titles and prices – is untrue: land prices followed the same trends after suit was filed in 1974 within the claim area as outside of it, and owners had no trouble securing title insurance. (A620-634). The Oneidas proposed that the Court could explicitly eliminate any concerns on this score by coupling an award of damages with a declaration that current titles are secure and not clouded by a damages award against the State. Also, the Oneidas presented evidence of the State's unclean hands in knowingly violating the Nonintercourse Act and deliberately cheating the Oneida. *See Tri-Star Pictures v. Leisure Time Prods.*, 17 F.3d 38, 44 (2d Cir. 1994) (laches requires an exercise of discretion grounded in the equities on both sides).

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explanation offered for failure of heirs to challenge confiscation of Tory land under Attainder Act over two centuries).

The Oneidas submitted a declaration pursuant to Rule 56(f) identifying the additional discovery that would be taken to respond to the defendants' laches defense, which defense had been stricken years before discovery. (A684-89). Even assuming, for the sake of argument, that *Sherrill* permits reconsideration of precedent holding laches inapplicable to Indian land claims, the District Court could not enter summary judgment on a laches defense without finding facts it did not and could not find on the record before it.

The Oneidas have litigated their trespass damages claims for nearly forty years. At least one part of those claims, as to the 1795 state transaction, has been upheld at every level in the federal court system, including two decisions by the Supreme Court. Even though the Court in *Oneida II* reserved on the laches defense, the Court rejected other time-based defenses and made this concluding observation:

> One would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statutes of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied.

470 U.S. at 253. Even if *Cayuga* correctly reads *Sherrill* to make the laches defense now available to the Oneida trespass damages claims, the Oneidas are entitled to test the factual support for the defense before the import of *Oneida II*, if not its literal holding, is overturned.

III. *CAYUGA* WAS WRONGLY DECIDED.

Although all of our preceding arguments assume the correctness of *Cayuga*, including its holding that the laches defense is available as to tribal land claims, we preserve for en banc or Supreme Court review the argument that *Cayuga* was wrongly decided. If *Cayuga* were read, as the State proposes, to eliminate all remedies for old tribal land claims, *Cayuga* would effectively overrule *Oneida II*, which the Court in *Sherrill* stated it did not do, 544 U.S. at 221, and would conflict with the will of Congress. Congress enacted § 2415 to establish a rule governing timeliness of old tribal land claims. The language, history, and purpose of § 2415 and the Nonintercourse Act preclude the application of equitable defenses based on the passage of time, including laches, to bar liability for such claims.

CONCLUSION

The portion of the District Court's order denying summary judgment with regard to the Oneidas' fair compensation claim should be affirmed; the portion of the order granting summary judgment with regard to trespass damages should be reversed.

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Respectfully submitted,

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